SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1066

THE POSTER EXCHANGE, INC.,
Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, METRO-GOLDWYN-MAYER, INC. (formerly LOEW'S, INC), TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL SCREEN SERVICE CORPORATION IN OPPOSITION

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Question Presented

Did the District Court and the Court of Appeals correctly determine that the petitioner herein failed to submit specific material facts showing that a genuine issue for trial exists as to whether the defendants-respondents herein had conspired in violation of the antitrust laws with resultant prejudice and injury to petitioner?

Statement

Petitioner, plaintiff in this civil antitrust suit, seeks review by this Court of the Court of Appeals' unanimous affirmance of a summary judgment granted by the District Court to five defendants, all distributors of motion pictures. The remaining defendant, National Screen Service Corporation (hereinafter "National Screen"), respectfully submits this brief in opposition to the petition for certiorari.

Petitioner's original complaint

The original complaint (filed on July 17, 1961) named this respondent, National Screen, as the only defendant, and asserted a private treble-damage antitrust claim. Petitioner, a poster-renter or "jobber" engaged in the business of selling or renting to motion picture theatres standard motion-picture advertising accessories—such as posters and stills for theatre lobby and billboard display (Original Complaint, par. 2, R. 1)—sought an injunction and treble damages (R. 12) from National Screen, which has for many years been engaged in the business of manufacturing such motion picture advertising accessories under *non-exclusive* licenses from motion picture producers, and distributing them not only directly to motion picture theatres (thus competing with petitioner for the motion picture theatres' business), but also to "jobber" poster-renters such as the petitioner herein (Original Complaint, par. 3, R. 2).

The gravamen of petitioner's original complaint was that though National Screen had previously made its own-manufactured advertising accessories available to the plaintiff poster-renter, petitioner was notified by National Screen on February 15, 1961, that from and after May 16, 1961, National Screen would no longer supply advertising accessories to "jobbers" such as petitioner, but would restrict

its business to dealing directly with motion picture theatres (Original Complaint, pars. 15 and 16, R. 8).

In its original complaint, petitioner expressly conceded that it had succeeded "at the expense" of National Screen, in actively competing for the business of renting to motion picture theatres the advertising accessories which it acquired from National Screen for many years (Original Complaint, par. 12, R. 7). Petitioner asserted that unless National Screen was compelled to continue to make advertising accessories available to petitioner, the petitioner would, in all probability, be required to go out of business, and requested that the Court require National Screen to continue to make its own standard accessories available to the petitioner herein (Original Complaint, pars. 18-21, R. 9-11).

Petitioner's amended complaint—filed *almost two years later*—not only added five new parties, but for the first time, charged all defendants with conspiracy to monopolize.

On the very eve of trial, *i.e.*, on March 13, 1963, almost two years after the filing of this action—the case having been set down for trial during the early part of April, 1963—petitioner's prior counsel, Mr. C. Ellis Henican, Jr., moved for leave to withdraw from the case, although he continued to act as counsel for the plaintiff *Exhibitors Poster Exchange, Inc.*, a poster-renter owned by the same individual who is part-owner and a director of petitioner herein, in a poster-renter action against the same respondents in the United States District Court in New Orleans, La. Mr. Henican was replaced by Mr. Francis T. Anderson, who had represented poster-renters in all but one of the dozen or more treble damage suits brought by poster-renters against National Screen and motion picture producers—all of which actions have been decided in favor of the respondents herein. (*Lawlor* v. *National Screen Service Corporation et al.* (3d Cir.) 270 F. 2d 146, cert.

den. 362 U. S. 922; *Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840; *Lipp, Siegel, Schrader, Mitchel, Riff and Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835).

On the very first day after becoming petitioner's attorney herein, Mr. Anderson moved for leave to serve an amended complaint, bringing in for the first time the five motion picture distributor defendants, and asserting for the first time in this case, that those defendants conspired with National Screen, "to monopolize the business of distributing standard accessories on a national scale" (cf. petitioner's motion, R. 29-32, particularly par. 7, R. 31), through the device of exclusive licenses to National Screen (Amended complaint, pars. "8" and "8A", R. 38-9).

Significantly, however, petitioner's new counsel overlooked that prior counsel had conceded in its original complaint that "by the end of 1957 National Screen had ceased to have exclusive contract rights * * *" (Par. 11, R. 6). New counsel therefore felt compelled to repeat that fact which had been judicially established by the "Consent Decree" entered on March 29, 1957, in *United States* v. *National Screen Service Corp. et al.*, S. D. N. Y., Civ. 75-138, 1957 Trade Cases, Par. 68,670.

Petitioner's judicial admissions that there is no genuine issue of fact as to conspiracy.

At the time petitioner's new counsel, Mr. Anderson, moved for leave to serve the amended complaint in which he added the five respondent motion picture distributors, charging them with having conspired with National Screen to effect a monopoly in the distribution of motion picture standard advertising accessories, he was thoroughly aware of the fact that petitioner's director and owner of a one-third interest—Mr. W. H. Cobb—had already testified in

a companion action brought by his New Orleans poster-renter firm (R. 88) (*Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corporation,* E. D. La., Civil Action No. 11,145) that he did not know of any facts "indicating conspiracy between these producer-defendants and National Screen" (R. 83-4).

In fact, in that New Orleans case, in reliance upon that conclusive admission and the total absence of any other evidence, Judge Christenberry on July 26, 1961 granted the motions of all of the motion picture distributor-defendants for summary judgment-expressly reciting as the basis for his orders, that there existed no genuine issue of fact to be submitted to the trial court. The plaintiff in that action, *Exhibitors Poster Exchange, Inc.,* did not appeal from Judge Christenberry's orders. Significantly, the attorneys for that plaintiff, i.e. Exhibitors Poster Exchange, Inc., which is owned by Mr. Cobb, who is also a director and one-third owner of petitioner herein, were the same attorneys (Henican, James & Cleveland) who represented petitioner herein from the inception of the instant action in July 1961, until they withdrew almost two years later in March 1963, and were replaced by Mr. Anderson, who for the first time injected the charge of conspiracy.

On the basis of the admission by petitioner's director and part-owner, the same Mr. Cobb, that he knew of no facts indicating conspiracy between the distributor-respondents herein and National Screen, the distributor-respondents herein moved for summary judgment (R. 81-83).

On the argument herein, in the District Court, Mr. Anderson confessed that he had no evidence other than that which he had heretofore relied upon in *Lawlor* v. *National Screen Service Corporation et al.,* where after a protracted trial, the District Court had entered 140 Findings and Fact and 12 Conclusions of Law, completely absolving National Screen and the motion picture distributor defendants of the charges of monopolization and conspiracy

to monopolize—a determination affirmed by the unanimous Court of Appeals for the Third Circuit (270 F2d 146), and by this Court's denial of certiorari (362 U. S. 922).

Mr. Anderson's concession that he had no evidence of conspiracy to offer in the present case other than the evidence he had presented as attorney for plaintiffs in the *Lawlor* case was specifically noted in the District Court's opinion herein (R. 93):

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the *same evidence* in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation." (Emphasis added.)

Petitioner's attorney has repeatedly conceded that the issues as to liability are identical in all the poster-renter cases throughout the United States—in all of which except one—petitioner's attorney, Mr. Anderson, was attorney for the plaintiffs.

Mr. Anderson's admission before the District Court in this case that he has no evidence as to conspiracy other than that which was submitted in the *Lawlor* case has been repeatedly made in the many poster-renter cases in which he has represented the plaintiffs, which, as we have pointed out, included all of them, except the *Smith* case in Oklahoma City (*Bob Smith d/b/a Theatre Poster Service* v. *Paramount Film Distributing Corp., National Screen Service Corp., et al.*, W. D. Okla., No. 9274), which similarly ended

by the Court's granting summary judgment in favor of the defendants.

Indeed, in a pre-trial hearing held in the instant case on December 9, 1963, the Court asked Mr. Anderson how the present case differed from *Vogelstein* v. *National Screen Service Corporation et al.* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840, another case wherein Mr. Anderson represented the plaintiff poster-renter, and received this response (S.M. pp. 26-7):

> "The Court: Let me ask you this. Now how did Vogelstein and Poster Exchange differ?"
>
> * * *
>
> "Mr. Anderson: * * * all the cases throughout the country, the *Smith* case out in Oklahoma, *Lawlor* in Philadelphia and *Vogelstein* in Washington, wherever you go, as I see it, *they are the same with respect to the proof of liability* * * *." (emphasis added).

Again—the same admission by Mr. Anderson to District Judge Luongo in *Vogelstein* v. *National Screen Service Corporation et al., supra.* Judge Luongo's opinion states:

> "At argument on the motion to dismiss the Court asked counsel for Vogelstein if he had any additional evidence over and above that presented at the Lawlor trial. His reply was, in effect, that the case *might* be tried differently, or that it *might* be tried by other counsel who *might* present the case in a different fashion. At no time did he indicate to the Court that he was in possession of additional evidence to present, only that the case might be differently tried (and tried to a jury rather than to the Court alone)." (204 F. Supp. at 597; emphasis the Court's.)

The official transcript of the argument before Judge Luongo on January 2, 1962, reflects the following question by the Court and Mr. Anderson's response (S.M. p. 28):

> "The Court: Well, have you come into possession of additional facts that were not available at the time of the *Lawlor* trial?

> Mr. Anderson: I don't know that I am in possession of additional facts.* * *" (S.M. p. 28)

Mr. Anderson's avowed position that all the poster-renter cases are *"the same with respect to the proof of liability"*, was his position even *before* the *Lawlor* case, *supra,* was tried, for when the *Lawlor* trial was about to commence in the District Court in Philadelphia, Mr. Anderson as plaintiff's attorney stipulated that the findings of fact by the Court after a trial in the *Lawlor* case, on the fundamental and dispositive issues of conspiracy to monopolize, would be determinative of these same issues in *six* companion cases brought by other poster-renters in other parts of the United States (*i.e., Lipp, Siegel, Schrader, Mitchell, Riff and Vogelstein* v. *National Screen Service Corporation, et al., supra,* p. 4) which were then pending in the District Court. Mr. Anderson later attempted to disavow that stipulation, which the Courts refused—(*Lipp* v. *National Screen Service Corp., et al.,* 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835), the Court of Appeals stating:

> "The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling *several cases involving the same points.* The judge could have ordered a consolidated trial for all of them. See Fed. R. Civ. P. 42(a), 28 U. S. C. It was considered more feasible to handle the litigation in the manner stipulated for." (290 F. 2d at 322; emphasis added.)

Thus, not only petitioner's attorney but the Court of Appeals judicially recognized the complete identity of factual and legal issues in all of the poster-renter cases—and in all, petitioner's attorney was attorney for the plaintiff.

The entry of summary judgment and the Court of Appeals' unanimous affirmance.

After finding that no factual evidence had been submitted in support of the newly-added charge of conspiracy, the District Court pointed to the further circumstance of Mr. Anderson's judicial admission that he had no evidence of a conspiracy between the motion picture distributors and National Screen other than that which he had previously relied upon in *Lawlor*, and correctly concluding that "there appears to be no genuine issue of fact involved herein" (R. 93), granted the motion of the distributor-respondents for summary judgment (R. 90-94).

The District Court further denied petitioner's motion for reconsideration (R. 97-98).

The Court of Appeals for the Fifth Circuit unanimously affirmed the summary judgment against petitioner, with the very significant comment:

> "We have carefully reviewed the record and conclude that the trial court committed no error." (Appendix C to the Petition for Certiorari, p. 28.)

ARGUMENT

I

The summary judgment was based on petitioner's failure to show any genuine factual issue as to the allegation of conspiracy.

In opposing the distributor-respondents' motion for summary judgment in the District Court, petitioner made no showing by affidavit or otherwise of any factual issue on its charge of conspiracy, but rested upon the bare allegations of conspiracy pleaded in its Amended Complaint.

This complete default in showing the existence of any genuine issue of fact compelled the entry of summary judgment against petitioner, under the clear mandate of Rule 56(e) of the Federal Rules of Civil Procedure, as amended in 1963, which in pertinent part provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, ***must set forth specific facts showing that there is a genuine issue for trial.*** If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added.)

In its unanimous decision affirming the summary judgment, the Court of Appeals cited Rule 56(e), and also *Dressler* v. *MV Sandpiper* (2d Cir.) 331 F. 2d 130, where the history of the recent amendment to Rule 56(e) was carefully reviewed, demonstrating that the amended Rule was specifically designed to preclude the possibility that bare allegations in a pleading could "stand in the way of granting an otherwise justified summary judgment * * *" (331 F. 2d at 132).

It is, therefore, abundantly clear from the decision of the District Court (finding "no genuine issue of fact involved herein", R. 93) and the Court of Appeals (expressly predicating its affirmance on a careful review of the record, and citing Rule 56(e), F. R. Civ. P.) that the determination of the Courts below rested on petitioner's utter failure to show the existence of any genuine factual issue on the alleged participation of the distributor-respondents in a conspiracy in violation of the antitrust laws—and *not* by virtue of the doctrine of *res judicata*—as petitioner would want this Honorable Court to assume.

Thus, completely ignoring its own default in even attempting to show a genuine factual issue—which is the

reason why summary judgment was entered—petitioner disingenuously asserts in this Court that the summary judgment was based on an improper application of the doctrine of *res judicata*. The falsity of this proposition is dramatized by petitioner's shift in this Court from the legal position which it had taken on its appeal in the Court of Appeals. In its brief in the Court below, petitioner represented to that Court that the "*Question Involved*" was "*whether plaintiff is bound by a judgment entered in another jurisdiction in a case prosecuted by an altogether different unrelated plaintiff, and involving substantially different issues of fact*". Respondent National Screen's answering brief in the Court of Appeals demonstrated the shocking inaccuracy in petitioner's representation of the "Question Involved", by quoting the above quoted admissions of petitioner's attorney (set forth in this brief, pp. 6-8, *supra*) to the effect that all the poster-renter cases present identical factual issues.

Faced with the irrefutable record of his own concessions that all of the poster-renter cases present the identical facts and legal theory and issues, petitioner's attorney has now abandoned his former contention that the *Lawlor* case involved "substantially different issues of fact", but attempts to argue in this Court that the "Questions Presented" include the question as to whether the Courts below had the right to determine this case by applying the principle of *res judicata*. The difficulty with petitioner's "Question" is that it rests upon a false premise. As we demonstrated, the Courts below did no such thing. The plain fact, as already shown (pp. 9-10, *supra*), is that the determinations of the District Court and the Court of Appeals were predicated on petitioner's failure to introduce, by affidavit or otherwise, any evidence from which the Court could discover the existence of a genuine issue of fact as to petitioner's claim of conspiracy. *Res judicata* was never urged by respondents in the Courts below, and petitioner's attempt to persuade this Honorable Court

that *res judicata* was the basis for decision in the Courts below, is completely contradicted by everything in the record, including the testimony of petitioner's director and part owner, that he knows of no facts indicating a conspiracy, and the admission of petitioner's attorney that he has no new evidence of any conspiracy other than that which all Courts in over a dozen cases have rejected as insufficient as a matter of law.

Petitioner quotes at length from a portion of District Judge Morgan's opinion (Petition, pp. 6-7), but ends the quotation without quoting this truly significant finding (R. 93):

> "Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the *Lawlor* case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation.
>
> Consequently, it is the belief of this Court that the motion for summary judgment filed by the motion picture distributor defendants should be granted *as there appears to be no genuine issue of fact involved herein.*" (Emphasis added)

The absence of any genuine issue of fact, expressly found by the District Court and confirmed by the Court of Appeals' careful review of the record, not only warranted but compelled summary judgment under Rule 56(e), a determination which had nothing whatever to do with the doctrine of *res judicata*.

II

Petitioner's irrelevant contention that the *Lawlor* judgment rested solely on failure to prove injury is patently false.

Since *res judicata* is *not* the basis for the judgment which petitioner asks this Court to review, the petitioner's *second* "Question Presented" (p. 2) and the purported "analysis" of the *Lawlor* case set forth on pages 9-15 of the Petition are totally irrelevant to any issue now before this Court. But though respondents do not rely on the doctrine of *res judicata,* and petitioner's contentions respecting the *Lawlor* case have no bearing on whether respondents are entitled to summary judgment herein, we wish nevertheless to point out the shocking inaccuracy of petitioner's argument, to demonstrate the transparent insincerity of petitioner's position in this Court.

Petitioner's *second* "Question Presented" reads as follows (Petition, p. 2):

> "If the judgment in the earlier suit [referring to the *Lawlor* case] was entered *solely* on the ground that the plaintiff had failed to prove the fact of loss, can the judgment be used in a later suit as an adjudication that the defendants had not conspired to violate the federal antitrust laws?" (emphasis supplied)

Even the most cursory review of the 140 Findings of Fact and 12 Conclusions of Law entered by District Judge Kraft in the *Lawlor* case (which are part of the Record in this case) and the very meticulous and comprehensive opinion by the Court of Appeals in *Lawlor* (270 F. 2d 146, cert. den. 362 U. S. 922), completely refutes petitioner's statement that the judgment in defendants' favor against Mr. Anderson's clients in that case was "entered solely on the ground that the plaintiff had failed to prove the fact of loss."

Any doubt that the District Court specifically determined the absence of any antitrust violation by the motion picture distributor defendants in the *Lawlor* case is dispelled by the following "Conclusion of Law" entered by District Judge Kraft (R. 170):

> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Moreover, in the unanimous opinion of the Court of Appeals, affirming Judge Kraft's findings and conclusions, the following statement appears (270 F. 2d at 155):

> "One last aspect of this case deserves mention. In an effort to show a conspiracy, plaintiffs rely upon United States v. Paramount Pictures, Inc., 1948, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260, and Interstate Circuit, Inc. v. United States, 1939, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610, which hold that conspiracy may be established not only by express agreement but also by a showing of adherence to concerted action which has been contemplated or invited. Not only have the plaintiffs here failed in their proof of an 'arrangement,' 'plan,' or 'scheme' but the great weight of credible evidence clearly shows that the film companies, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task."

And if there were any need for further judicial confirmation of the obvious truth that the *Lawlor* judgment was *not* entered "solely on the ground that the plaintiff had failed to prove the fact of loss", the point is clearly made by District Judge Morgan in the instant case (R. 92), who quoted with approval the following statement by Judge Luongo in *Vogelstein* v. *National Screen et al.*, 204 F. Supp. 591, 596, aff'd 310 F. 2d 738, cert. den. 374 U. S. 840:

> "It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer."

In view of the foregoing quotations—all of which are from judicial decisions in cases where petitioner's present attorney, Mr. Anderson, appeared as counsel—petitioner's attempt to persuade this Court that the *Lawlor* decision was not "on the merits" on the issues of conspiracy and attempt to monopolize but was "entered solely" on plaintiff's failure to prove injury, is nothing short of an imposition upon this Court.

But as already pointed out, the judgments herein in the Courts below do not rest upon the doctrine of *res judicata*, and thus petitioner's characterization of the *Lawlor* case is both wholly irrelevant to the real issue presented and, in any event, patently inaccurate.

Petitioner's extensive quotation from prior decisions in *Lawlor* v. *National Screen*, 349 U. S. 322, and in the instant case, 305 F. 2d 647 (Petition, pages 17, 20) are wholly irrelevant on this application, since those decisions were rendered at preliminary stages of both the *Lawlor* case and this case. Subsequent developments in each case—in *Lawlor*, the subsequent trial (the result of which, in

favor of the respondents, this Court refused to review, 362 U. S. 922) and in the instant case, the granting of summary judgment—superceded the earlier decisions quoted by petitioner.

CONCLUSION

The decision of the District Court, unanimously affirmed by the Court of Appeals, reflects petitioner's total failure to present any evidence showing the existence of a genuine factual issue. The petition for certiorari should be denied.

Respectfully submitted,

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